No. 87-132

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

PENNSYLVANIA DENTAL ASSOCIATION; DELAWARE VALLEY DENTAL SOCIETY; ERIE COUNTY DENTAL ASSOCIATION, INC.; HARRISBURG AREA DENTAL SOCIETY; LUZERNE COUNTY DENTAL SOCIETY; MONTGOMERY-BUCKS DENTAL SOCIETY; ODONTOLOGICAL SOCIETY OF WESTERN PENNSYLVANIA; SCRANTON DISTRICT DENTAL SOCIETY; YORK COUNTY DENTAL SOCIETY; FIFTH DISTRICT DENTAL SOCIETY; DENNIS W. KING, D.D.S.; CHARLES M. LUDWIG, D.D.S.; THEODORE R. PALADINO, D.D.S.; THOMAS L. PERKINS, D.M.D.; and KAY F. THOMPSON, D.D.S.,
Petitioners

v.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD,
Respondent

Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

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QUESTION PRESENTED

Whether this Court should decline to review the Third Circuit's reversal and remand of summary judgment as to Section 1 Sherman Act claims concerning a collective boycott by dentists of participation in and cooperation with Pennsylvania Blue Shield's prepaid dental program where (i) the Third Circuit's decision expressly followed this Court's recent unanimous decision in *Federal Trade Commission v. Indiana Federation of Dentists,* 106 S.Ct. 2009 (1986), which held that dentists' collective refusal to submit x-rays to insurers regarding benefit claims violates Section 1 of the Sherman Act and (ii) the Petitioners have presented purely fact-bound issues without significant supporting evidence for review.

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Petitioners

v.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, Medical Service Association of Pennsylvania, d/b/a Pennsylvania Blue Shield, responds to the Petition of the Pennsylvania Dental Association, et al., and requests that this Court deny the Petition on the basis of the facts and authorities hereinafter set forth for this Court's consideration.

I. STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, states in relevant part:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal . . . ."

II. COUNTERSTATEMENT OF THE CASE

Because facts involved in the complex procedural posture of this case constitute a significant part of the Petitioners' Reasons for Granting the Writ and because the Petitioners' statement thereof in their Petition is incomplete and frequently erroneous, the following incontrovertible facts are presented.

Procedural History

In October, 1981 the Commonwealth of Pennsylvania filed a complaint in the United States District Court for the Middle District of Pennsylvania against some of the Petitioners herein contending that they violated § 1 of the Sherman Act, principally by causing dentists to terminate Pennsylvania Blue Shield (PBS) participating dentist agreements. In November, 1981 the Defendants in that case filed a third-party complaint naming, *inter alios,* PBS as a Third-Party Defendant, claiming that PBS' dental program constituted a price-fixing conspiracy and a group boycott in violation of § 1 of the Sherman Act and that PBS had monopolized or attempted to monopolize dental insurance sales in Pennsylvania in violation of § 2 of the Sherman Act.

In March, 1982 PBS filed, *inter alia,* a Counterclaim naming the Petitioners[1] herein (Dentists) as counterclaim defendants. PBS' Counterclaim alleged, in pertinent part, that the Dentists violated § 1 of the Sherman Act by collectively refusing to participate with PBS and by collectively opposing PBS' cost containment and utilization review activities. [J.A. 310-365] The instant Petition concerns PBS' Counterclaim.

On March 13, 1983, the district court entered an Order setting a trial date of July 11, 1983 for the Dentists' and PBS' claims, setting a cut-off date of May 31, 1983 for pre-trial motions and requiring the preparation of a joint pre-trial order (PTO) by each party specifying, *inter alia,*

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[1]Petitioner Pennsylvania Dental Association (PDA) is the Pennsylvania statewide affiliate of the American Dental Association and is comprised of ten component districts, including Petitioner Odontological Society of Western Pennsylvania (Odont) and Petitioner Fifth District Dental Society (Fifth District). The ten districts are subdivided into a number of local societies including Petitioners Harrisburg Area Dental Society (HADS) and York County Dental Society (York), both of which are within the Fifth District's geographic territory, and Petitioners Erie County Dental Association, Inc. (Erie), Luzerne County Dental Society (Luzerne), Scranton District Dental Society (Scranton) and Montgomery-Bucks Dental Society (Montgomery-Bucks). Petitioner Delaware Valley Dental Society (Delaware) is not directly affiliated with the PDA.

Petitioner Charles M. Ludwig, D.D.S. is the immediate past President of the PDA, was one of the principal proponents of the Dentists' collective refusal to participate with PBS and authored the HADS Dental Insurance Manual which embodied the tenets of the Dentists' opposition to PBS. Petitioner Theodore R. Paladino, D.D.S. is a lawyer as well as a dentist and as an attorney his representation of dentists has been exclusively devoted to matters opposing PBS' cost containment activities. Petitioners Thomas L. Perkins, D.M.D. and Kay F. Thompson, D.D.S. have been officers of the Odont and have orchestrated collective resistance to PBS in Western Pennsylvania. Petitioner Dennis W. King, D.D.S. was a founder of Delaware which collectively opposed and partially frustrated PBS' establishment of a capitation dental program for U.S. Steel Corporation in suburban Philadelphia.

the names of witnesses to be called, a summary of expert witness testimony and a list of all documents to be offered. [J.A. 2435-40]

In May, 1983 PBS filed a motion for summary judgment as to the claims presented against it. In October, 1983 the district court granted such motion in its entirety. [Pet. App. A-94 - A-124] In October, 1984 the Third Circuit affirmed [Pet. App. A-70 - A-93] and this Court denied certiorari on April 15, 1985.

The principal issue presented by the Dentists' monopolization claims against PBS involved definition of the relevant product market. Based in part on affidavits of purchasers of dental care coverage, it was decided that PBS, as a health service corporation, was in direct competition with commercial insurers offering indemnity dental insurance. As so defined, PBS' 35% market share was held to be insufficient to establish a § 2 Sherman Act violation.

On December 23, 1983, *more than 200 days after the district court's deadline for filing pre-trial motions,* the Dentists filed their own motion for summary judgment with respect to PBS' Counterclaim, which motion is the genesis for the Dentists' Petition currently at issue. PBS filed a motion to strike the Dentists' summary judgment motion as being untimely filed. Thereupon, the district court stayed all proceedings concerning the Dentists' summary judgment motion pending ultimate determination of its grant of summary judgment to PBS on the Dentists' claims. [J.A. 3831-33]

Following this Court's denial of certiorari in April 1985, PBS requested the district court to reactivate PBS' Counterclaim against the Dentists. On June 18, 1985 PBS presented a motion to the district court for leave to file a

supplemental joint Pre-Trial Order requesting permission to substitute economic experts and identify additional exhibits and witnesses. [J.A. 3840-42] The district court never ruled on PBS' motion. However, at an October 3, 1985 status conference the district court made it clear that its March 13, 1983 order which established deadlines for filing PTOs was no longer in effect.

On April 17, 1986 the district court granted the Dentists' motion for summary judgment against PBS on PBS' Counterclaim. [Pet. App. A-20 - A-67] The district court's opinion was based primarily on its erroneous conclusion that the evidence did not show that the Dentists had conducted a boycott of PBS and on the now reversed Seventh Circuit decision in *Indiana Federation,* 745 F.2d 1124 (7th Cir. 1984), that dentists' collective refusal to submit x-rays to dental insurers did not result in anticompetitive effects. [Pet. App. A-46 - A-59]

The Third Circuit reversed the district court's grant of summary judgment based on the evidence presented and this Court's recent decision in *Indiana Federation.* [Pet. App. A-1 - A-19] The Third Circuit held that:

> "The Supreme Court's unanimous decision in *Indiana Federation* requires that we reject the district court's rule of reason analysis. Clearly there is sufficient evidence in the summary judgment record to support a finding that under the rule of reason there was a violation of section 1 of the Sherman Act . . . . Indeed, this is an *a fortiori* case." [Pet. App. A-11]

Facts of Record

PBS' Counterclaim at issue is based on Pennsylvania's dentists' collective opposition to PBS' group prepaid dental benefit program. The essence of PBS' dental program,

and the primary object of the Dentists' collective opposition, is the PBS participating dentist system, whereby PBS enters into contracts with dentists pursuant to which a dentist agrees to perform dental services in return for PBS' direct payment based on a UCR formula allowance, and not to bill the difference (balance bill) between PBS' allowance and a dentist's charge for services to PBS subscribers.[2]

In the majority of instances, PBS' UCR allowance equals dentists' current charges. However, frequently dentists' charges exceed PBS' allowance. A PBS dental subscriber is assured of receiving service benefit coverage, i.e., no balance billing, only if he utilizes a participating dentist (par).[3] PBS, at the request of its customers, has implemented administrative practices to highlight the value to its subscribers of patronizing par dentists, including the distribution of lists of par dentists to PBS' customers.

Because PBS subscribers desire a choice of dentists, a sufficient number of pars is necessary to PBS' operation of an effective service benefit dental program. PBS sold its first group dental contract in January, 1972 and by mid-1974 PBS had achieved its goal of having more than 70% of the state's dentists enrolled as participants. [J.A. 2409, 9178]

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[2]PBS also covers services provided by dentists who do not contract with PBS (nonpars) but in such instances PBS pays its subscriber rather than the dentist.

[3]The mechanics of determining PBS' UCR allowance have been described by the Third Circuit [Pet. App. A-76 - A-77] and the district court [Pet. App. A-100 - A-101] in their decisions concerning the Dentists' claims against PBS. Furthermore, the district court, in granting summary judgment to the Dentists on PBS' claims, and the Third Circuit, in reversing and remanding, explicitly recognized that PBS' UCR allowance results in "what in many cases will be a discount". [Pet. App. A-5, A-56 n.11]

Beginning in the fall of 1974, various local and district dental societies began passing resolutions advising their members to avoid or resign from participating dentist contracts.[4] [J.A. 7503-07, 7550, 7556-58, 7589-90, 4580-90, 7676-79, 7659-60] Concurrently, the PDA attempted to negotiate with PBS to eliminate PBS' prohibition against balance billing by pars and PBS' distribution of lists of par dentists to its customers. [J.A. 1119, 7498, 7559-60, 7627, 7665] Following the aforesaid departicipation activities, the percentage of PBS par dentists statewide plummeted from 72% in 1974, to 59% in 1976, to less than 54% in the early 1980s. [J.A. 9178-90]

The primary focus of the Dentists' collective opposition to PBS was the impact of service benefits on their competitive relationships. [J.A. 1111-13, 7552, 7559-60, 7665, 7714-15] However, the Dentists also collectively opposed and hampered PBS' cost containment and utilization review activities, particularly PBS' efforts to verify that dentists were not charging PBS subscriber-patients higher fees because of insurance coverage. Although PBS had documented that many dentists were overcharging PBS, based on the advice of the PDA and other Petitioners [J.A. 1473-74, 7797, 8203-04, 8568-70, 9139-41], many

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[4]In its opinion the Third Circuit accurately summarized the anticompetitive nature, purpose and effect of the departicipation resolutions. [Pet. App. A-6 - A-7] In addition to adopting departicipation resolutions, various Petitioners supplemented their departicipation resolutions, *inter alia*, by circulating written pledges of nonparticipation [J.A. 7556-58], by publishing the names of members who had not departicipated [J.A. 7607, 7663-64], by distributing form letters of resignation from PBS [J.A. 1232, 4580-90, 7610] and by urging nonparticipation in dental society newsletters and publications. [J.A. 291-300, 4494-506, 7504, 7671, 7706, 7797, 7982-83, 8121, 8291-92, 8368-70, 8357-58, 8397, 9147]

dentists refused to verify their charges to PBS. [J.A. 9169-73]

Commencing in 1977, three years after the departicipation boycott began, the PDA and other Petitioners began to protest and challenge virtually every Pennsylvania Insurance and Health Department filing made by PBS involving its dental program. Beginning in 1980, more than six years after the departicipation boycott began, the Dentists initiated efforts to enact state legislation to alter PBS' dental program.

Notwithstanding the fact that by 1978 this Court had established that the antitrust laws fully applied to the "learned professions", the Dentists' collective opposition to PBS' dental programs did not abate. With one exception, the local and district societies did not rescind their deparcipation resolutions [J.A. 1044-46, 1314, 1346-47, 2396-97, 2421-22, 2544-49, 2665-66] and Petitioner Erie reaffirmed its position against participation in 1980. [J.A. 8080] Dental society publications continued to exhort collective opposition to participation. [J.A. 291-300, 7982-83, 8075, 8121, 8367-70, 9147]

Dentists in Pennsylvania recognize that participation can increase their volume of patients and that nonparticipation can result in the loss of PBS subscriber-patients. [J.A. 133-34, 248-49, 303-06, 479, 484, 779-80, 1430, 2226-32, 2399-2401, 2423-28, 2479-84, 7736] Similarly, the Dentists recognize that only in geographic areas where there is a scarcity of par dentists can nonpars balance bill their subscriber-patients and be reasonably protected against loss of patients seeking service benefits. [J.A. 303-06, 843-45, 4580-90, 7504-05, 7982-83]

The record in this case includes a host of evidence regarding the factors which influence dental insurance customers' selections of dental insurers. In support of its motion for summary judgment against the Dentists' monopolization claims, PBS presented affidavits of benefit managers of twelve businesses which provide dental coverage for their employees. [J.A. 2711-2752] In opposition to the Dentists' summary judgment motion, PBS presented three additional customer affidavits. [J.A. 8955-59, 8978-81, 8995-99]

The affidavits establish that PBS is in direct competition with commercial indemnity insurers and that the principal consideration in selection of a dental insurer is the price of coverage. [J.A. 2712-15, 2718, 2721-22, 2724-25, 2734-35, 2742-44, 2748] However, the affidavits also show that (i) if PBS' price quote is competitive, the service benefit feature of PBS' dental program acts as an incentive that is unavailable through commercial insurers' programs, and (ii) benefit managers realize that the advantage of PBS coverage is only significant if there is an adequate supply of par dentists to serve the employees. [J.A. 2711-15, 2734-44] Moreover, the affidavits also demonstrate that some customers are particularly interested in service benefit dental coverage.[5] [J.A. 8978-81, 8995-99, 9066-68]

The reduction in the level of PBS par dentists caused by the Dentists' deparcipation activities inhibited PBS' ability to deliver effective service benefit coverage in areas where collective opposition to PBS was particularly strong, such as the Harrisburg/Central Pennsylvania region. Affidavits from two customers in that region establish that

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[5]In Pennsylvania, PBS and Delta Dental of Pennsylvania (which was created by the PDA) are effectively the only insurers offering service benefit dental coverage. [J.A. 7715]

they declined to purchase PBS' dental coverage, even though PBS submitted a competitive price quote, and that their decisions were materially caused by an insufficient level of par dentists to provide effective service benefit coverage.[6] [J.A. 8955-59, 8978-81] These affidavits are entirely consistent with the affidavits presented by PBS to rebut the Dentists' erroneous argument that the provision of service benefits constituted a relevant submarket. Three affidavits presented by PBS to support its summary judgment motion explicitly recognized that PBS service benefit coverage is an advantage but only if there are enough par dentists.[7]

Even the district court recognized that "[t]here is . . . no doubt that the dentists have the capacity to affect, by concerted action, Blue Shield's success as a seller

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[6]These two affidavits were offered by PBS in opposition to the Dentists' motion for summary judgment. One affiant, Raymond Barth of Holy Spirit Hospital, had supplied an earlier affidavit (presented by PBS in support of its summary judgment motion as to the Dentists' monopoly claims). Although the Dentists erroneously assert that Mr. Barth's two affidavits are inconsistent as to his perception of the significance of service benefit coverage, a comparison of his two affidavits shows that he felt that service benefit coverage is advantageous *if* there are enough par dentists and that it is disadvantageous if there are not enough par dentists because the lack thereof can result in serious employee dissatisfaction. [J.A. 2738-41, 8955-59]

[7]According to Boeing Vertol Company, "the 'UCR' and participating dentist features can provide cost savings to a dental insurance customer (i) if there are enough participating dentists in the area where insured employees live. . . ." [J.A. 2714] Centre Community Hospital "did not view the availability of 'participating dentists' under the Blue Shield program as making that program in any way superior . . . in view of the fact that very few dentists in the area of State College participate with Blue Shield." [J.A. 2743] Similarly, the availability of pars was not a "substantial factor" in Giant Food Stores' selection of Blue Shield as its dental carrier "due to the number of employees who elect to use the services of non-participating dentists." [J.A. 2736-37]

of . . . dental services policies which have the [service benefit] feature . . . ." [Pet. App. A-46] The evidence of record also establishes that the lost sales damage to PBS is readily quantifiable and that the Dentists' boycott caused many of PBS' over 1,000,000 dental subscribers to be balance billed by dentists who, but for the boycott, would have accepted PBS' UCR allowance as payment in full.[8]

Although the Dentists assert in their Petition that "for all practical purposes there is no discount" involved in participation with PBS and thus they had no logical economic motive to collectively refuse to participate with PBS, the abundant facts of record contradict such assertion. [J.A. 1459-60, 2620-26, 7504, 7676, 9024, 9163] The Dentists enacted deparcipation resolutions and used their collective refusal to deal as a bargaining chip in negotiations with PBS to eliminate the economic effects of PBS' par dentist/UCR System. [J.A. 1111-13, 7552, 7559-60, 7606.9, 7714-15]

III. SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari essentially seeks a review of the United States Court of Appeals for the Third Circuit's application of this Court's recent unanimous decision in *Federal Trade Commission v. Indiana Federation of Dentists,* 106 S.Ct. 2009 (1986) to facts which are virtually identical to those at issue in *Indiana Federation.*

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[8]PBS' economic expert analyzed the effect of the Dentists' departicipation boycott on PBS' subscribers and concluded that the boycott resulted in an aggregate overcharge of about $4,000,000 to PBS subscribers. [J.A. 9037-39] Furthermore, PBS' expert opined, based on facts of record [J.A. 9026], that the boycott-induced reduction in pars caused PBS to lose the sale of 24,450 dental contracts which caused PBS to lose about $2,500,000 in net income. [J.A. 9025-36]

The fact-bound nature of the issues presented was recognized by both the Third Circuit and the district court. Furthermore, the Third Circuit's decision does not conflict with the decisions of this Court or any federal court of appeals, nor does this case present any important question of federal law not yet settled by this Court. The transparent constitutional arguments presented in the Petition certainly do not merit review by this Court because they are not supported by the record. The Petition for a Writ of Certiorari should be denied.

IV. REASONS FOR DENYING THE WRIT

1. The Third Circuit's Decision Is Consistent With The Decisions Of This Court And Of The Circuit Courts Of Appeal

A. This Case Is Controlled By Indiana Federation

The Dentists' conduct and the resultant anticompetitive effects at issue here are not only similar to that declared violative of § 1 of the Sherman Act by this Court in *Indiana Federation,* but are even more egregious since the Dentists' conduct directly affects the cost of insured dental services and is clearly unresponsive to consumer preference. *NCAA v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 107-08 (1984). The Third Circuit's decision is entirely consistent with this Court's decisions in *Indiana Federation* and *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978) which held that agreements among competitors that limit consumer choice by impeding the ordinary give and take of the market place, absent counterveiling procompetitive virtue, violate § 1 of the Sherman Act under Rule of Reason analysis.

Herein, the Dentists, motivated by their collective opposition to PBS' contractual limits on payments to par dentists and PBS' cost containment and utilization review activities, conducted a statewide boycott of PBS' prepaid dental program. Throughout the state the various dental society Petitioners enacted resolutions directing their members not to participate with PBS, enlisted dentists to sign pledges not to participate [J.A. 7556-58] and repeatedly assured their memberships that they need not fear losing PBS subscriber-patients so long as they collectively remained non-participating. The Dentists' departicipation boycott succeeded in causing a significant reduction in the ranks of PBS par dentists. [J.A. 9178-90]

In some regions where collective opposition to PBS was particularly strong, the level of PBS par dentists dropped to and has remained at approximately 33% or less [J.A. 9178-90] and PBS lost dental insurance customers because it was unable to offer a sufficient number of par dentists to make the service benefit feature of its dental program a realistic advantage to its customers. Similarly, the Dentists' collective refusal to cooperate with PBS' utilization review activities resulted in increased administrative costs and significant overcharges for dental services and reinforced the effects of the departicipation boycott. [J.A. 9011-19]

The components of PBS' dental program that the Dentists collectively opposed and sought to frustrate (such as the ban on balance billing, PBS' publication of the inherent economic incentives to patronize par dentists and PBS' cost containment and utilization review activities) had their origins in the requests of PBS' customers for cost-effective, competitively priced dental services. [J.A. 1463-64, 1468-70, 7415, 7498, 7561, 7596, 7599, 8083, 8997]

Although the Dentists sought to cloak their collective opposition in hollow quality of care rhetoric, the facts of record clearly show that the Dentists sought collectively to limit or eliminate the competitive effects of PBS' dental program on their practices.

In *Indiana Federation* this Court, using a Rule of Reason analysis, held that dentists' collective refusal to submit x-rays to insurers regarding benefit claims violated § 1 of the Sherman Act based on the rationale that:

> "A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them."

Indiana Federation, 106 S.Ct. at 2018.

In the instant case, the Dentists not only collectively refused to compete with respect to PBS' cost containment and utilization review activities, as in *Indiana Federation,* but also collectively refused to compete on the basis of net cost of dental services to PBS subscriber-patients.[9] Therefore, the Third Circuit correctly held that the instant case "is an *a fortiori* case" to *Indiana Federation* and that "*Indiana Federation* requires [reversal and rejection of] the district court's rule of reason analysis." [Pet. App. A-11] No procompetitive virtues of the Dentists' boycott were identified by the Third Circuit and none have been advanced by the Dentists in their Petition.

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[9]As recognized by Mr. Justice Brennan in *Blue Shield of Virginia v. McCready,* 457 U.S. 465, at 483 (1982) "an increase in the net cost" of a subscriber's medical services demonstrates an antitrust violation.

The anticompetitive effects of the Dentists' boycott are clearly established in the record. Thus, the Dentists' argument that the Third Circuit drew improper inferences or made hypothetical assumptions beyond the dictates of *Indiana Federation* is incorrect. In essence, the Dentists' arguments in this regard request this Court to review the fact-bound nature of the controversy.

In *Indiana Federation* the observed effect of the dentists' collective activities (that insurance companies were not receiving the x-rays they desired) was considered sufficient to prove a § 1 Sherman Act violation under the Rule of Reason even though the member dentists allowed insurance companies to use other means of evaluating their diagnoses in reviewing benefit claims. In *Indiana Federation* such conclusion was bolstered by the Indiana dentists' documents and newsletters which revealed that "unrestrained competition tended to lead their colleagues to comply with insurers' requests for x-rays". 106 S.Ct. at 2017.

In the instant case, as in *Indiana Federation,* the Dentists' own documents and newsletters reveal that unrestrained competition would lead dentists to participate with PBS.[10] Similarly, the record clearly establishes that dentists compete for the patronage of PBS subscriber-

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[10]For example, the preamble to an Erie deparcipation resolution states, in pertinent part, that:

> "In all honesty, there are some of our members [older members] who should, in their own selfish, best interest, be on the list of participating dentists .... They have everything to gain and nothing to lose .... They should vote against my resolution, but they won't." [J.A. 7505]

Likewise, the April 1981 issue of the Odont Bulletin published a letter to the editor which included the following statements:

(Continued on next page)

patients, that PBS par status aids in attracting subscribers who seek paid-in-full service benefits [J.A. 133-34, 248-49, 303-06, 479, 484, 779-80, 1430, 2226-32, 2399-2401, 2423-28, 2479-84, 7736] and that the most significant effect of par status on a dentist is the obligation to accept a reimbursement which may be less than the amount billed.

The Dentists' efforts in their Petition to belittle the effect of the discount element of PBS' UCR allowance are not supported and thus reinforce the inescapable conclusion that they seek to have this Court address fact-bound issues. Although PBS' UCR allowance does, in a majority of instances, equal dentists' full charges, it frequently does not.[11]

(Continued)

"Are you blue because you are obligated to accept a lesser fee than you are entitled to?" "Are you BLUE because you're afraid patients won't come to you if you're not?" "The only way we as individuals can resist our own takeover is to withdraw from participation in Blue Shield." [J.A. 291-300]

[11]While PBS' par dentist/UCR reimbursement is a neutral factor insofar as individual dentists' charging practices is concerned, it can result in a discounted net price for services to PBS subscribers. [J.A. 1458-60, 2620-26, 9024] The Dentists' assertion that PBS has taken inconsistent positions as to the impact of the UCR allowance is erroneous, primarily because it fails to recognize that a different market and different issues were presented by the Dentists' antitrust claims against PBS. The Dentists' claims focused on alleged price fixing while the facts showed that PBS' UCR system has no effect on par dentists' charging practices. However, the instant Petition concerns the effects of the Dentists' collective refusal to compete for patients who seek competitively priced dental services and the evidence establishes that the principal price consideration for PBS' dental subscribers is net cost, i.e., protection against balance billing. [J.A. 2425, 7756-57, 8997-98, 9067] If PBS' UCR allowance will be accepted as payment in full, the subscriber has no reason to be concerned with the amount of the dentist's charge.

Furthermore, the instances in which PBS' UCR allowance results in a discount were of sufficient magnitude to cause the Dentists to make their opposition thereto the focal point of their departicipation boycott. Amidst the adoption of the departicipation resolutions the PDA advised PBS that its members were particularly disturbed by the "contractual agreement [of] participation" [J.A. 7559], and that "we do not believe that [PBS] should require a dentist who participates . . . to accept as full payment . . . the payment benefit determined by [PBS]." [J.A. 7665]

Similarly, as recently as 1981, the then President of Petitioner Fifth District lectured dentists that "if you do join [PBS], you are going to be audited and you are going to have to accept the prices" and he suggested that collective refusal to participate with PBS would "really [expletive deleted] [PBS]". [J.A. 843][12]

In areas where the departicipation boycott was particularly effective, PBS subscribers were presented with the unenviable choice of foregoing service benefit protection or undergoing great inconvenience to find a par dentist.[13]

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[12]The record is replete with evidence that the Dentists' boycott was principally motivated by their opposition to the effect of PBS' dental programs on their pocketbooks. [J.A. 843, 1111-13, 7552, 7559-60, 7606.9, 7665, 7714-15] Furthermore, the record shows that non-pars, whose charges exceeded PBS' UCR allowance, did in fact bill and collect the difference from their PBS subscriber patients. [J.A. 248-49, 2388, 2399-2401]

[13]Employees of Gettysburg School District were forced to travel out of county and even to Maryland to find dentists who were willing to accept PBS' UCR allowance as payment in full. [J.A. 9066-68] Petitioner Ludwig, the courier of the departicipation boycott, informed a PBS union account in 1976 that the calls its members were making to Harrisburg dentists inquiring about their PBS par status were "of little or no use", since the "majority of HADS members were 'nonparticipating'." [J.A. 7756-57]

PBS' economic expert analyzed the effect of the boycott on PBS' subscribers and concluded that the boycott resulted in an overcharge of about $4,000,000 to PBS subscribers. [J.A. 9037-39] Thus, the record amply supports the Third Circuit's holding that "[c]learly there is sufficient evidence in the summary judgment record to support a finding that under the rule of reason there was a violation of section 1 of the Sherman Act . . . ." [Pet. App. A-11]

Thus, this Honorable Court should deny the Dentists' Petition because it essentially requests that this Court reverse its recent unanimous decision in *Indiana Federation.*

B. The Third Circuit Did Not Establish New Standards For Determining Sherman Act Immunity For Petitioning Activities

Nothing in the Third Circuit's opinion alters or conflicts with the principles established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny that legitimate governmental petitioning activities are protected by the First Amendment from antitrust challenge. Instead of establishing a new quantitative test for determining antitrust immunity, as argued by the Dentists, the Third Circuit simply recognized that an otnerwise illegal coercive boycott is not shielded from the antitrust laws by subsequent petitioning of the government.

The Dentists base their contention that the Third Circuit established a new quantitative test for determining antitrust immunity on the following passage from the Third Circuit's decision:

> "We are equally unimpressed with the organized dentists' effort to characterize their challenged activities as mere solicitation of governmental action with respect to passage and enforcement of laws. *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Any such activities were minor when compared to the massive effort directed toward convincing dentists collectively to resist participation contracts." [Pet. App. A-16]

The above-quoted statement was obviously necessary to place in context the Dentists' immunity defense as well as to rectify the district court's legally and factually erroneous blanket holding that "[i]t is a more accurate view of the dentists' conduct . . . to perceive of all of their conduct at issue . . . from the very inception of the participating dentist system, as conduct protected under the *Noerr-Pennington* doctrine." [Pet. App. A-60]

As the Dentists implicitly acknowledge in the Petition (Pet. 11), application of *Noerr* principles necessarily involves a factual analysis. The undisputed facts of record show that:

> (i) the Dentists adopted their departicipation resolutions in 1974 and 1975;
>
> (ii) concurrently, the Dentists employed their collective refusal to participate with PBS as a bargaining chip to eradicate the intrusion of PBS' dental program on their pre-existing competitive relationships;
>
> (iii) the Dentists have continued their departicipation resolutions and related boycott activities to date; and
>
> (iv) the Dentists did not petition the state legislature to revise PBS' manner of operation until 1980, *six*

years after the first departicipation resolutions were adopted.

By segregating analytically the Dentists' departicipation resolutions from their subsequent petitioning activities, the Third Circuit acted consistently with the Court's recent pronouncement in *Celotex Corp. v. Catrett,* 106 S.Ct. 2548, at 2553 (1986) that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported . . . defenses." Anticompetitive associational resolutions, guidelines and policy statements do not enjoy absolute First Amendment protection. *Professional Engineers,* 435 U.S. at 697-99.

Rather than creating a quantitative antitrust immunity test, as asserted by the Dentists, the Third Circuit's decision, consistent with *Noerr, Professional Engineers,* and *Celotex,* merely separated acts which may be factually immune from those which are not and corrected the district court's numerous misconceptions of the parameters of *Noerr* immunity.[14] Because the Dentists' immunity argument essentially requests this Court to reverse a holding

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[14]In addition to erroneously viewing all the Dentists' conduct from the inception of their boycott as protected by *Noerr,* the district court had also erroneously intimated that because of PBS' state-enabled status all of the Dentists' interactions with PBS are "in essence the petitioning of the government." [Pet. App. A-60] Also, on appeal, the Dentists advanced many patently erroneous immunity arguments such as that their non-profit statuses immunized their conduct (which is contradicted by this Court's decisions in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.,* 456 U.S. 556 (1982) and *Professional Engineers,* supra) and that their resolutions and guidelines were permissible, non-commercial conduct (which is also contradicted by *Professional Engineers* and by *Indiana Federation).* The fact that the Third Circuit did not bother to specifically address the multitude of patently erroneous immunity arguments presented is not a basis to infer that it has *sub silento* rejected the *Noerr* doctrine.

the Third Circuit did not make, no immunity controversy is presented for review.

2. No Meritorious Due Process Or Administration Of Justice Issues Are Presented By The Petition

The Dentists' argument that they have been deprived of due process of law because the Third Circuit supposedly reversed the district court's decision in a "fundamentally unfair manner" (Pet. 17) is frivolous. Furthermore, the Dentists' factually and legally erroneous attempts to show that the record contradicts some of the Third Circuit's findings demonstrate the fact-bound nature of the instant case.

In points A, B, C, and D of Section 3 of their Reasons for Granting the Writ the Dentists assert that PBS' evidence of lost sales caused by the boycott is insufficient based upon what the Third Circuit described as "a shotgun blast of arguments" "[m]ost of the pellets [of which] are not even close to the target." [Pet. App. A-13] The Dentists' arguments about lost sales injury are predicated upon two absolutely erroneous statements of legal principles.

(i) The Dentists' argument that admissible evidence must be relied upon to support PBS' theory of injury is directly contradicted by this Court's statement in *Celotex,* 106 S. Ct. at 2553, that the nonmoving party does not have to "produce evidence in a form that would be admissible at trial in order to avoid summary judgment."

(ii) The Dentists' argument that the prior determination in the Dentists' case against PBS (that PBS and commercial insurers compete in the same relevant product market notwithstanding PBS' unique service benefit feature) is the "law of the case" and

thus precludes a finding of lost sales injury to PBS is legally incorrect because different issues were presented by the Dentists' claims against PBS and different markets were involved.

PBS' claim of lost dental insurance sales caused by the Dentists' boycott is based on well established market facts as set forth in the Counterstatement of the Case, supra. If PBS' price quote is competitive and if there is an adequate supply of par dentists to make PBS' service benefit coverage effective, many customers will choose PBS' dental coverage rather than commercial indemnity dental insurance.

The Dentists' argument that PBS has made inconsistent arguments as to dental customers' desires for service benefits, in defending against the Dentists' monopoly claims and in demonstrating injury to PBS in the form of lost sales, is completely incorrect. PBS' evidence that the Dentists' boycott caused PBS to lose dental insurance sales[15] is not inconsistent with PBS' prior argument that service benefit and commercial indemnity dental insurance programs are reasonably interchangeable for customers' purposes. [J.A. 3057-67]

The principal issue raised by the Dentists' monopoly claims (whether service benefit dental programs constituted a relevant submarket in the dental insurance market) is substantially different than that presented by PBS' claim of lost sales. The affidavits presented in opposition to the Dentists' monopoly claims established that the principal consideration in selection of a dental insurer was the price of the coverage. [J.A. 2712-15, 2718, 2721-22, 2724-25, 2734-35, 2742-44, 2748] Based thereon, and relying on this Court's decisions in *Brown Shoe Co., Inc. v. United States,*

[15]See Counterstatement of the Case at 9-11, supra.

370 U.S. 294, 326 (1962) and *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377 (1956), PBS successfully argued that the relevant product market included both service benefit and commercial indemnity dental insurance.

To prove fact of injury in the form of lost sales, in order to recover damages on its counterclaim, PBS need only prove that the paucity of par dentists caused by the Dentists' boycott was a material cause of the lost sales. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). The issue of relevant product market presented by the Dentists' monopoly claims was substantially different, i.e., whether service benefit coverage is reasonably interchangeable for consumers purposes with commercial indemnity coverage. Thus, the Dentists' argument that PBS is precluded from recovering its lost sales damages because of the law of the case is meritless.

The Dentists' arguments that Raymond J. Barth of Holy Spirit Hospital, W. Russell Faber, Chief Clerk of the Senate of Pennsylvania and Paul J. Feldstein, Ph.D. (PBS' economic expert) are precluded from testifying at trial are simply wrong and were correctly rejected by the Third Circuit and implicitly rejected by the district court.[16]

The assertion that Messrs. Barth and Faber have contradicted themselves as to the relative importance of effective service benefit coverage in their selections of dental insurers is also without support. In the case of Mr. Barth, the Dentists have misrepresented the substance of his first affidavit by omitting material parts thereof in quoting the

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[16]Both Mr. Barth and Mr. Faber submitted affidavits demonstrating that their respective employers' decisions to not purchase PBS' dental coverage were materially caused by the paucity of par dentists in their areas. Professor Feldstein has opined as to the amount of damage caused to PBS and its subscribers resulting from the Dentists' boycott.

affidavit in their Petition.[17] Viewed together, Mr. Barth's affidavits [J.A. 2738-41, 8955-59] show that he felt that service benefit coverage provides an extra benefit if there are enough par dentists and is disadvantageous if there are not enough par dentists because the lack thereof can result in serious employee dissatisfaction. He chose a commercial insurer, rather than PBS, even though the price quotes were similar because the lack of a sufficient number of par dentists caused service benefit coverage to be a negative, not a positive, factor. The Dentists' attack on Mr. Faber's affidavit is based merely on their failure to recognize that PBS need only show that the Dentists' boycott was a material cause of its injury and need not negate all possible contributory facts.[18] *Zenith,* supra.

The Dentists' argument that Professor Feldstein's affidavit [J.A. 9025-54] should not be considered because of

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[17]One of the Dentists' material omissions was Mr. Barth's statement that based on his experience with Blue Shield plans, the "scarcity of participating doctors undermines the value of [the service benefit] aspect of the plan". [J.A. 2740]

[18]Mr. Faber, in the letter he wrote to PBS declining to purchase UCR dental coverage [J.A. 6840-41], in the affidavit he supplied to PBS [J.A. 8978-81] and in the separate affidavit he supplied to the Dentists [J.A. 6834-41] identified two interrelated reasons for not buying PBS: the fact that the selected insurer computed usual charges at a higher percentile than PBS and PBS' relatively low level of dentist participation.

Related to the Dentists' illusory arguments about the efficacy of Mr. Faber's affidavit are their repeated erroneous assertions (Pet. 3, 18, 25, 26) that John Brouse, a PBS Vice President, "admitted" that PBS did not lose sales because of a lack of par dentists. While Mr. Brouse did testify that, to his knowledge, PBS did not fail to obtain an account "specifically" because of a lack of par dentists [J.A. 3594], such testimony is certainly not an admission. Moreover, Mr. Brouse also testified that "the dearth of participating providers was an issue that contributed to [PBS'] lack of success" in selling dental coverage to the Senate of Pennsylvania. [J.A. 1229]

supposed "false or unsupported factual assumptions" is similarly misplaced since his affidavit recited the extensive scope of evidence upon which he based his conclusions. [J.A. 9026-39] Even the district court recognized that "[t]here is . . . no doubt that the dentists have the capacity to affect, by concerted action, Blue Shield's success as a seller of fixed rate. . . dental services policies which have the [service benefit] feature. . . ." [Pet. App. A-46]

On the issue of case management argued by the Dentists, no novel or important questions are presented. Although the district court did issue a pre-trial order in March of 1983 (when it contemplated a trial commencing in the summer of 1983) the subsequent procedural events of the case resulted in the district judge modifying the pre-trial order.[19] Furthermore, in its decision erroneously granting summary judgment to the Dentists the district court obviously considered the evidence presented in the Barth, Faber and Feldstein affidavits at issue. See Pet. App. A-42, A-46, A-61 - A-62.

The Dentists' argument about whether Messrs. Barth, Faber and Feldstein will be permitted to testify further accentuates the interlocutory nature of the issues presented in the Petition. This Court does not usually grant certiorari

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[19]As described in the Counterstatement of the Case, the Dentists' motion for summary judgment which is herein at issue was filed more than 200 days after the deadline set in the pre-trial order. Thereafter, the district court stayed all proceedings thereon until its grant of summary judgment to PBS on the Dentists' claims was fully appealed. Following this Court's denial of certiorari on the Dentists' claims against PBS, PBS filed a motion to substitute economic experts and to identify additional witnesses and exhibits. The district court never ruled on PBS' motion but indicated at an October, 1985 status conference on PBS' claims that its March, 1983 pre-trial order was no longer in effect and that counsel were advised to follow the dictates of the local rules and future orders of the district court.

to review nonfinal judgments. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327 (1967). Accordingly, this Court should refrain from reviewing this case prior to trial on the merits with pre-trial evidentiary issues as yet unresolved.

The interlocutory nature of the issues presented also militates against the Dentists' illusory due process argument. Since the Third Circuit's decision just requires the Dentists to stand trial on PBS' claims, the fundamental due process cases cited by the Dentists such as the "Scottsboro Boys" case, *Powell v. Alabama,* 287 U.S. 45 (1932), have no application whatsoever.

The Dentists' remaining arguments, points E, F and G of Section 3, are likewise without merit. In view of the massive errors committed by the district court in granting summary judgment to the Dentists, the Third Circuit's decision to remand the entire case to the district court is certainly not grounds for granting certiorari.

The Dentists' assertion that the Third Circuit *sua sponte* reversed summary judgment as to the Dentists' direct petitioning is a very marginal argument. Since the Dentists' presented broad, obviously erroneous immunity arguments, the Third Circuit's perfunctory rejection thereof is not surprising, especially since the district court had erroneously viewed all of the Dentists' activities from the inception of their departicipation boycott as protected by *Noerr.* Furthermore, the evidence of record shows that the fundamental departicipation urgings of the Dentists have continued unrelented.[20]

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[20]With the exception of HADS, none of the dental society Petitioners have rescinded the departicipation resolutions.

The Dentists' argument that the Third Circuit did not mention certain Petitioners in its decision does not merit review by this Court. PBS presented evidence that each Petitioner was intimately involved in the statewide coercive boycott of PBS' dental programs to protect dentists' competitive relationships. [J.A. 309, 1475-80, 1482-90, 2597-2601, 8289, 8291-92, 8401-04, 8413-14, 8527-29] Thus, each Petitioner (unnamed by the Third Circuit) has had adequate opportunity to defend against PBS' claims.

As to the Dentists' collective resistance to PBS' in-office reviews, the Dentists' so-called constitutional defense that they were only giving "protected legal advice" (Pet. 28) is nullified by dentist testimony interpreting such "advice" as a direction to not cooperate. [J.A. 2446, 2469-71, 2491-93] Furthermore, since the Dentists' collective resistance to in-office reviews is directly analogous to the collective refusal to submit x-rays to insurers that was condemned in *Indiana Federation,* any blurring of the Dentists' spurious constitutional defenses by the Third Circuit does not merit review by this Court.

No novel or important issues are presented by the Dentists' Petition. The facts are clear that the Dentists collectively opposed the new competitive pressure injected by PBS' dental program. Although the boycott began in an era when the Dentists believed that their "learned profession" was antitrust immune, subsequent decisions by this Court that the antitrust laws apply to doctors, dentists, lawyers and engineers did not deter their patently anticompetitive behavior, but only resulted in a more covert continuing conspiracy. [J.A. 7989]

The Dentists' essential complaint in their Petition is that since they lost their antitrust case against PBS, fairness dictates that PBS should not be permitted to prosecute the

Dentists' conspiracy. The fallacy of the Dentists' reasoning, and to a large extent the error of the district court's perception of PBS' antitrust claims, is the failure to recognize the critical antitrust law distinction between the standards of legality applied to concerted conduct of competitors (such as the Dentists) and unitary conduct, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and the fact that while effective service benefit coverage provides a dental insurance purchaser an advantage, the dental insurance market is essentially price driven.

Section 1 of the Sherman Act proscribes concerted action in restraint of trade, while Section 2 only limits monopolistic conduct which controls prices and excludes competitors. Since this distinction has been consistently recognized since 1919, *United States v. Colgate & Co.*, 250 U.S. 300 (1919), there is no reason for this Court to reevalute 70 years of decisional law, much less its controlling decision in *Indiana Federation* rendered little more than one year ago.

V. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: August 21, 1987

RULE 28.1 CERTIFICATE

Respondent Medical Service Association of Pennsylvania, d/b/a Pennsylvania Blue Shield, respectfully advises the Court pursuant to Rule 28.1 of the Rules of this Court that it has no parent and that it owns stock in the following subsidiaries (except wholly owned subsidiaries) or affiliates: Camp Hill Insurance Company, Health Benefits Management, Inc., Keystone Health Plan West, Inc. and Keystone Health Plan Central, Inc.